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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1620

EARL EILERS, et al,

Petitioners,

v.

HERCULES, INC., et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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No. .....

EARL EILERS, et al,

Petitioners,

v.

HERCULES, INC., et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Earl Eilers, Peggy Patrick, individually and as administratrix of the Estate of Glenn Patrick, Deceased, and for and on behalf of the minors, Kenneth Glenn Patrick and Theresa Lynn Patrick, and American & Foreign Insurance Company, Intervenor, workmen's compensation insurance carrier for EasTex, Inc., pray that a writ of certiorari issue to review the decision and judgment in this cause of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas, made final by the refusal of the Supreme Court of Texas to grant Petitioners' application for writ of error and said Court's

overruling of Petitioners' motion for rehearing on its said refusal.

OPINION AND DECISIONS IN THE STATE APPELLATE COURTS

The opinion in this cause of the Court of Civil Appeals for the Ninth Judicial District of Texas at Beaumont, Texas, printed as Appendix C below, is reported at 458 S.W. 2d 221.

The decision in this cause of the Supreme Court of Texas to refuse Petitioners' application for writ of error, finding no reversible error, was made without opinion on January 13, 1971, is printed as Appendix D, below, and is reported in Volume 14, Texas Supreme Court Journal at page 164.

The decision in this cause of the Supreme Court of Texas, overruling Petitioners' motion for rehearing on their application for writ of error, was made without opinion on February 10, 1971, is printed as Appendix D, below, and is reported in Volume 14, Texas Supreme Court Journal at page 226.

JURISDICTION

The final decision of the Supreme Court of Texas in this case was rendered on February 10, 1971, making final the judgment of the intermediate State Court, the Court of Civil Appeals.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

In this case, Petitioners specifically set up and relied throughout on their rights under statutes of the United States, to wit:

The federal Safety Appliance Acts, §§ 1-16, as amended, March 2, 1893, c. 196, 27 Stat. 531, 532 (1893); April 1, 1896, c. 87, 29 Stat. 85 (1896); March 2, 1903, c. 976, 32 Stat. 943 (1903); April 14, 1910, c. 160, 36 Stat. 298, 299 (1910); June 25, 1948, c. 646, 62 Stat. 909 (1948); August 14, 1957, 71 Stat. 352 (1957); April 11, 1958, 72 Stat. 86 (1958); 45 U.S.C., § 1, *et seq.* (1954), as amended. (Transcript 20, 34 43-48)[1].

This suit alleging violation of the federal Safety Appliance Acts and the absolute liability thereunder of the Respondents, and each of them, jointly and severally, was instituted in the District Court, 1st Judicial District, Jasper County, Texas, by Petitioners, Earl Eilers, for personal injuries, and Peggy Patrick as administratrix of Glenn Patrick's estate, individually and for and on behalf of Kenneth Glenn Patrick and Theresa Lynn Patrick, for the death of Glenn Patrick, husband and father of these Petitioners (Tr. 20, 36). The American & Foreign Insurance Company, compensation insurance carrier for EasTex, intervened for workmen's compensation, medical and death benefits paid, and attorneys' fees (Tr. 43-48).

Following the presentation of the evidence, in response to the "special issue" charge submitted to them by the Trial Court, the jury found that the dome lid of the tank

[1] Citations are to portions of the Appellate Record in this cause, including the Transcript and Statement of Facts.

car in question was a safety appliance, that the dome lid had failed to operate properly to release the car's internal pressure, and that such failure was a proximate cause of this occurrence (Tr. 553).

Further, the jury found the explosion was not the result of an unavoidable accident (Tr. 593), and that no act or omission on the part of EasTex, its supervisors, foremen, or employees, either individually or in combination, was the sole cause of this explosion (Tr. 592). Finally, no negligence on the part of either Glenn Patrick or Earl Eilers was found by the jury to have proximately caused the explosion (Tr. 577-586).

In response to the damages issues submitted to them, the jury awarded $80,000.00 each to Peggy Patrick, Kenneth Glenn Patrick, and Theresa Lynn Patrick, $1,500.00 for necessary funeral and burial expenses for Glenn Patrick, and $42,000.00 to Earl Eilers — a total of $283,500.00 (Tr. 594-598).

Judgment, including 6% interest thereon until paid, was entered by the Trial Court for Petitioners, including the Intervenor, against all Respondents, jointly and severally, for absolute liability pursuant to the federal Safety Appliance Acts, 45 U.S.C., § 1, *et seq.* (Tr. 635-639).

The intermediate Texas Appellate Court, the Court of Civil Appeals in Beaumont, reversed and rendered judgment for Respondents, on the theory that as a matter of

law the dome lid of this tank car was not a safety appliance so as to invoke the remedial absolute liability of the federal Safety Appliance Acts, 45 U.S.C., § 1, *et seq.* (App. A).

Petitioners timely moved for a rehearing before the intermediate Court, then filed their application for writ of error with the Supreme Court of Texas, which application was refused, with the notation "no reversible error" (App. D). Petitioners' timely motion for rehearing before the Supreme Court of Texas was overruled (App. D), making final the decision and judgment of the intermediate Texas Appellate Court.

Petitioners submit that these decisions of the State Appellate Courts are not in accord with previous, applicable decisions of this Court and other Courts, presenting this Court with a "federal question" as to the scope and construction of the federal Safety Appliance Acts and whether the dome lid of railroad tank car UTLX 48028 is a "safety appliance" under such Acts.[2]

It is further submitted that the decisions of the State Appellate Courts have deprived Petitioners of their property in contravention of the due process provision of the 14th Amendment to the United States Constitution.

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[2] *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908) at p. 293; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934) at p. 214.

QUESTIONS PRESENTED FOR REVIEW

A. IS THE DOME LID ON THE RAILROAD TANK CAR IN QUESTION, NO. UTLX 48028, A SAFETY APPLIANCE WITHIN THE SAFETY APPLIANCE ACTS AS APPLIED, AND SUBJECT TO THE ABSOLUTE DUTIES AND LIABILITIES ARISING THEREUNDER, WHEN IT WAS THE ONLY APPLIANCE FOR THE RELEASE OF THE TANK CAR'S INTERNAL PRESSURE UNTIL IT BUILT UP HIGH ENOUGH TO ACTIVATE THE CAR'S SAFETY VALVES, SET AT 25 POUNDS PER SQUARE INCH?

B. DO THE RESTRICTIVE DECISIONS OF THE STATE APPELLATE COURTS IN THIS CASE CONFLICT WITH THE PREVIOUS LIBERAL APPLICATION AND CONSTRUCTION OF THE SAFETY APPLIANCE ACTS AND THEIR ABSOLUTE PROTECTIONS BY THIS COURT AND OTHER COURTS?

C. DO THE RESTRICTIVE DECISIONS OF THE STATE APPELLATE COURTS IN THIS CASE, REVERSING AND RENDERING PETITIONER'S TRIAL COURT JUDGMENT BASED ON RECOVERY PURSUANT TO THE SAFETY APPLIANCE ACTS, DEPRIVE PETITIONERS OF THEIR PROPERTY IN VIOLATION OF THE DUE PROCESS GUARANTY OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATUTES INVOLVED

The federal Safety Appliance Acts, §§ 1-16, as amended, 45 U.S.C. § 1, *et seq.*[3], *cited* above, all of which are set forth in Appendix A, below.

STATEMENT OF THE CASE

Petitioners were the Plaintiffs and Intervenor, respectively, in the Trial Court. Respondents, Hercules, Inc., Atchison,

[3] Citations to the United States Code are to the 1954 edition thereof, as amended, unless otherwise indicated.

Topeka and Santa Fe Railway Company, and Union Tank Car Company, were the Defendants in the Trial Court.

In the interests of brevity and this Court's time, Respondent Hercules, Inc. will be referred to herein as "Hercules", Respondent Atchison, Topeka and Santa Fe Railway Company as "Santa Fe", and Respondent Union Tank Car Company as "Union Tank". EasTex, Inc. will be referred to as "EasTex".

On the morning of October 17, 1967, at the paper mill of EasTex in Jasper County, Texas, a 37-year-old railroad tank car, No. UTLX 48028, owned by Union Tank and under lease to Hercules, was being prepared to be shipped out via Santa Fe, carrying turpentine. During this preparation, the tank car's 50-pound dome lid was suddenly blown upward by internal pressure in the car. This lid struck and injured Earl Eilers, an EasTex pipefitter and a Petitioner herein, and struck Glenn Patrick, a pipefitter-helper, in the head, killing him instantly. His widow and children are also Petitioners herein.

Tank car UTLX 48028 was built for, and owned by, Union Tank and was under lease for the hauling of turpentine to Hercules (Pl. Ex. 3; SF 20, 21, 39). This car had been moved from Hercules' plant at Hattiesburg, Mississippi, to EasTex to be loaded with turpentine and returned to Mississippi (SF 39). The tank car was delivered to EasTex by Santa Fe, which also switched it around at EasTex, spotted the car where it was being loaded and where the explosion occurred, and took the car back out on its return to Hercules' Mississippi plant (SF 52, 63).

Union Tank's car had been regularly used by Hercules to haul turpentine on a number of occasions previous to this trip to EasTex (SF 39, 40, 43). The vapors of the turpentine are corrosive and can rust and corrode metal with which they come in contact. (SF 217, 406). The only internal cleaning which had been done on this car after its previous uses in hauling this corrosive matter was to put 140 pounds of ammonia into it (SF 31, 32) — the tank car's capacity is 100,000 pounds, or approximately 12,000 gallons (Pl. Ex. 2, 7, 8; SF 27, 43).

Hercules had regularly hauled turpentine in this Union Tank car since April, 1967, when Hercules, following an inspection of the car, described its condition as only "fair", (Pl. Ex. 2). No repair or maintenance was performed on this car from the time Hercules got it up to the date of the explosion approximately six months later (SF 34, 42, 44, 45).

Union Tank's car No. UTLX 48028 was equipped to be loaded either through a valve on the bottom of the car or through its dome (Pl. Ex. 3; SF 28). EasTex bottom-loaded the car and at least Hercules and Santa Fe were aware of the practice (SF 205, 693-695).

When Union Tank's car was delivered to EasTex by Santa Fe, all or most of the eight retaining bolts which were to bolt down its dome lid were loose and laying back (SF 296, 322, 652). When these bolts were loose and laid back, the dome lid was intended and expected to gradually release any internal pressure in the tank car which was less than the

25 pounds per square inch required to activate its safety valves (Pl. Ex. 5; SF 28, 29, 45, 56, 57).

After Santa Fe spotted Union Tank's car for loading for Hercules, it was connected up for the pumping of turpentine into it through its bottom-loading valve (SF 304, 306). When the cover over this bottom valve was removed prior to connecting up the car, about two gallons of rusty fluid came out (SF 298, 304). This indicated to the EasTex foreman, Sanford Wyble, and the millwright assisting him, Bobby Cryor, that it would be unnecessary to open the dome lid and turn the valve wheel to open the bottom-loading valve, since the valve was already open and the retaining bolts were off the lid and laying back (SF 298, 304). Mr. Wyble decided the car was ready and that no further action would be necessary — so, the pumping of turpentine could and did begin (SF 298, 307).

Until October 15, 1967, no further action by EasTex took place regarding Union Tank's car, except for the pumping of turpentine for Hercules for approximately one hour a day at the rate of 500 gallons an hour (Hercules Ex. 2; SF 212). However, while the car was at EasTex it was regularly yard-checked by Santa Fe personnel (SF 693-695).

On October 15th, it was learned by EasTex personnel that the dome lid would not open (SF 330, 331). There was no indication to EasTex at that time, or any other time, that the lid was struck tight, or was air-tight, or was not gradually releasing the car's internal pressure around its edges as expected (SF 331, 332, 492, 505, 596).

On the morning of Tuesday, October 17, 1967, Union Tank's car was to be prepared to be sent back out via Santa Fe to Hercules' Mississippi plant. Earl Eilers and his assistant, Glenn Patrick, proceeded to the top of the car to open the dome lid to see if the car was full (SF 473, 474). The dome lid's retaining bolts were still laying back, there was nothing to warn either Earl Eilers of Glenn Patrick that the dome lid was not releasing pressure (SF 474, 488, 489, 492, 505, 506).

Instead, pressure was in the tank car (SF 178) and as these two men bent over the 50-pound dome lid to remove it, it blew upward, striking both of them, causing them to fall to the ground, and traveling 75-150 feet through the air before landing (SF 98, 258, 473, 499, 500). Earl Eilers received extensive personal injuries. Twenty-five-year-old Glenn Patrick was killed, leaving a widow and a three-year-old son and a two-year-old daughter.

After this occurence, it was learned that the inside of the dome lid on tank car No. UTLX 48028 was and had been rusted and corroded and that the inside of the car's dome was also rusted and corroded. The rust and corrosion found was more than it would have been merely from the turpentine vapors to which the dome lid had been exposed while the car was at EasTex (SF 217, 259, 549, 550).

Additionally, it was determined that no one had turned the valve wheel inside the car's dome while it was at EasTex (SF 336) and that the valve wheel had only one turn on it, whereas had the bottom valve been opened by someone

using that wheel, it would have had three or four turns on it (SF 334, 335).

As of the morning of October 17, 1967, this tank car had been pumped into for 15 hours, 50 minutes at the rate of 500 gallons an hour (Hercules Ex. 2; SF 212). Therefore, when the occurrence of the dome lid exploding upward took place, the tank car contained a total of approximately 7,920 gallons, or about 66% of the car's capacity of 12,000 gallons (Hercules Ex. 2; SF 27, 43).

Before the safety valves on this tank car, set for 25 pounds per square inch, would activate to release its internal pressure, over 5,000 pounds of force would be exerted on the car's dome lid. (SF 177, 178). This was to have been gradually released around the edges of the dome lid before the pressure built up high enough to activate the safety valves (SF 108, 109, 257, 289).

Instead, the failure of the dome lid to operate properly so as to release the tank car's internal pressure permitted the pressure to build up, resulting in the dome lid blowing up and injuring Earl Eilers and killing Glenn Patrick.

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT

In this case, Petitioners submit that the Appellate State Courts have committed errors which do violence to the Safety Appliance Acts and the decisions of this Court because they have:

(1) decided a federal question of substance not heretofore specifically determined by this Court; and,

(2) decided a federal question of substance in a way not in accord with, but contrary to, applicable and controlling decisions of this Court.

This case presents the Court with the critical questions of just what the Safety Appliance Acts cover and how and by whom the determination of the Acts' applicability is to be made.

The erroneous position taken by the State Courts is that the appliance in this case, the dome lid of tank car No. UTLX 48028, was not a "safety appliance" as a matter of law.

This mistaken conclusion is shakily — founded on the proposition that only specifically-named appliances, or those used as substitutes therefor, are within the purview of the Acts' absolute protection.[4] Obviously, this completely fails to consider the repeated admonitions of this Court that the Acts must be liberally construed and applied.[5]

Petitioners contend that the Appellate decisions in this case yield a blatantly incorrect result which can only be attained by failing to consider the plan of absolute protection afforded by the Acts, *as applied.*

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[4] *Hercules, Inc. v. Eilers,* 458 S.W. 2d 221 (Beaumont Civ. App., 1970, writ refused, no reversible error) at p. 229.

[5] See, *e.g., United States v. Seaboard Air Line R. Co.,* 361 U.S. 78 (1959) at pp. 82, 83; *Shields v. Atlantic Coast Line R. Co.,* 350 U.S. 318 (1956) at pp. 324, 325; *St. Louis, I. M. & S. Ry. Co. v. Taylor,* cited above, 210 U.S. at pp. 295, 296. See also: *Lilly v. Grand Trunk R. Co.,* 317 U.S. 481 (1943) at p. 486. And see: *Thomas v. Kansas City Southern Ry. Co.,* 305 S.W. 2d 642 (Beaumont Civ. App., 1957, writ refused, no reversible error), *cert. denied* 356 U. S. 959; *Southland Paper Mills, Inc. v. Rhoads,* 434 S.W. 2d 730 (Beaumont Civ. App., 1968).

Petitioners submit that no correct determination of the scope of the Acts can be made by looking only to the Acts and ignoring the cases construing and applying them. The Acts, standing alone, constitute only a skeletal scheme for imposing sanctions for the use of non-complying equipment.

For example, no direct reference to civil liability for personal injuries and property damages is contained in the Acts themselves.

Yet, from the tangential reference in Section 7 regarding the inapplicability of the "assumption of risk" defense to injuries arising from violations of the Acts, together with the title of the original Acts,[6] a substantial jurisprudence has been developed with the aim of affording liberal, remedial, and absolute protection to those such as Glenn Patrick and Earl Eilers.

The unifying principles of the Acts and the proper judicial application thereof are perhaps best demonstrated in *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. 318.

The *Shields* case involved a Petitioner who was *neither* an "employee" *nor* a "traveler". Still he was afforded the absolute protections of the Acts.[7]

Further, the analysis of this Court clearly indicated that the purposes of the Acts and the satisfaction thereof would

[6] "Safety Appliance and Equipment on Railroad Engines and Cars, and Protection of Employees and Travelers."

[7] 350 U.S. at p. 325.

not be hindered or impeded by the failure of the regulatory agency to act:

> "The fact that the Commission in its 1911 regulations under § 3 has not specified uniform standards for dome running boards is not a binding administrative determination that they are not running boards for the purpose of § 2. * * * there is no showing that the regulations purport to exhaust by implication each category of statutory appliances listed in § 2. Omission of dome running boards of itself shows no more than that the Commission has not standardized all possible running boards within § 2. * * *
>
> * * * * *
>
> "* * * We conclude that failure of the Commission to standardize the dome running board need not mean it was not a required running board under § 2. To hold otherwise would relieve railroads from the absolute duty under § 2 to make safety appliances secure whenever new appliances are adopted which have not yet been standardized by the Commission."[8]

Therefore, even though it was *not* specifically named in the Acts, and *not* standardized by the I.C.C., this Court held that the "dome running board" involved in the *Shields* case *was* a safety appliance within the Acts' contemplation, carrying with it the absolute duties imposed by the Acts.

Indeed, the liberal application of the Acts by this Court began much earlier than the *Shields* case, clearly demonstrating the error of the State Appellate Court result in this case.

Johnson v. Southern Pacific Co., 196 U.S. 1 (1904) posed two vital questions of construction, both of which were

[8] 350 U.S. at pp. 321-323.

resolved *in favor* of the application of the Acts. First, this Court held that a "locomotive" was a "car" which must have automatic couplers, despite the contention that the title of the Acts indicated the intention of Congress to treat "locomotives" and "cars" separately and distinctly.

> "* * * Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on the rails, including locomotives. * * *"[9]

Further, this Court held that application of the Acts' provisions regarding "automatic couplers" required "*compatible* automatic couplers" which would operate on impact *with each other.* This Court overlaid the requirements of uniformity and compatibility on the stark statutory language requiring "couplers coupling automatically by impact"[10], stating:

> "* * * The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. *The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.*"[11]

The concept of "absolute" duties and the concomitant "absolute" liabilities under the Acts was likewise a matter calling for *Court determination of Congressional intention,*

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[9] 196 U.S. at p. 16.
[10] 45 U.S.C., § 2.
[11] 196 U.S. at pp. 16, 17. (Emphasis Added).

which though not directly stated, this Court declared as follows:

> "* * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. * * * Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. * * * It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. * * *"[12]

Extension by application of the Acts in order to provide the necessary absolute protection from improperly operating safety appliances was demonstrated in *Texas & Pacific Co. v. Rigsby*, 241 U.S. 33 (1916), when this Court stated:

> "* * * None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (Citing cases). * * *"[13]

In *Fairport, P. & E. R. Co. v. Meredith*, 292 U.S. 589 (1934) this Court interpreted the word "travelers", as used within the Acts' title, as transcending merely travelers on

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[12] *St. Louis, I.M. & S. Ry. Co. v. Taylor*, cited above, 210 U.S. at pp. 295, 296. See also: *Chicago, B. & O. Ry. Co. v. United States*, 220 U.S. 559 (1911) at p. 570; *Louisville & Nashville R. Co. v. Layton*, 243 U.S. 617 (1917) at pp. 620, 621; *Brady v. Terminal R. Ass'n.*, 303 U.S. 10 (1938) at p. 15.

[13] 241 U.S. at p. 39.

the railroad and *including* travelers in motor vehicles, exposed to risk of harm at railroad crossings:

> "* * * The most important purpose of a brake upon any vehicle is to enable its operator to check its speed or stop it more quickly than would otherwise be possible. * * * To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. *Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statue imposing the duty as including all of them.*"[14]

The opinion in *Davis v. Wolfe*, 263 U.S. 239 (1923) expressed this Court's *refusal* to limit the Acts' absolute protection to only those engaged in activities in which the safety appliance in question was specifically (statutorily) supposed to protect them. Instead, this Court stated:

> "* * * he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*"[15]

In *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384 (1949) this Court reaffirmed earlier decisions "(sweeping) all issues of negligence out of cases under the Safety Appliance Act."[16] Then, to implement the Acts' manifest purposes, this Court

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[14] 292 U.S. at p. 596. (Emphasis Added).

[15] 263 U.S. at p. 243. (Emphasis Added).

[16] 338 U.S. at p. 390. See also: *St. Louis, I.M. & S.R. Co. v. Taylor*, cited above, 210 U.S. at p. 294; *Chicago, B. & Q.R. Co. v. United States*, cited above, 220 U.S. at pp. 575-577.

construed the Acts' provisions regarding "couplers coupling automatically by impact"[17] as imposing the additional, *but unstated*, requirement that all such couplers "*remain* coupled until set free by some purposeful act of control."[18]

As a result of this construction, the Acts were *applied* to absolutely protect against the risk of harm from couplers disengaging accidently even though there was *no* specific statutory provision.

This Court, *faced with an absence of specific statutory language*, in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950) construed the Acts as requiring performance on the occasion in question.

Therefore, this Court concluded that the Plaintiff "did not have to show a 'bad' condition" of the safety appliance in question, since the appliance's failure to operate properly constituted a violation of the Acts' absolute duties[19].

And, as noted above, additional steps beyond the bare statutory and regulatory provisions to mold the Acts into a more effective and liberal means of absolute protection were taken by this Court in *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. 318.

First, this Court held that a "dome running board" was a safety appliance within the Acts, despite the fact that it

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[17] 45 U.S.C. § 2, cited above.

[18] 338 U.S. at p. 389. (Emphasis Added).

[19] 339 U.S. at pp. 98, 99. See also: *O'Donnell v. Elgin, J. & E.R. Co.*, cited above, 338 U.S. at p. 390; *Carter v. Atlanta & St. A.B.R. Co.*, 338 U.S. 430 (1949) at p. 434.

was not specified in the Acts or standardized in the I.C.C. regulations.[20]

This Court concluded that was no impediment to application and stated:

> "* * * At best, appliances standardized in Commission regulations represent the minimum of safety equipment and there is no prohibition of additional safety appliances. * * *"[21]

Second, this Court established that the injured workman, although an independent contractor working under instructions from the car's consignee and *not* strictly an "employee" or a "traveler", was owed an absolute duty by the hauling railroad under the Acts, stating:

> "* * * Having been upon the dome running board for the purpose of unloading the car, *he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability.* * * *"[22]

Seventy-eight years have passed since the enactment of the original Acts, but as indicated by the above-cited and quoted cases, this Court has maintained the Acts as a viable and effective means of "Protection of Employees and Travelers". Not by mechanically reciting the admittedly spare statutory language and advising an injured workman or traveler, or the family of one killed, that the Acts' protection did not reach them.

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[20] 350 U.S. at p. 321.
[21] 350 U.S. at p. 324. (Emphasis Added).
[22] 350 U.S. at p. 325. (Emphasis Added).

If that had been the tack, Petitioners submit that W. A. Shields, W. O. Johnson, William O'Donnell's widow, Floyd G. Affolder, Mayme Meredith, and the others to whom protection has been liberally afforded in the cases cited and quoted above, would have been left without a remedy under the Safety Appliances Acts. Without the liberal application of the Acts by this and other Courts to accomodate them, they had no clear, stated protection under the Acts.

Now, what Petitioners in this case urge is simply another application of these Acts which will implement and further the overriding purpose of the Acts — to afford absol te protection to those situated as were Glenn Patrick and Earl Eilers who are exposed to the risk of harm if a safety appliance does not do its job.

The letter and the spirit of the Acts provide the basis for the action sought by Petitioners. The heretofore liberal application of the Acts by this and other Courts provides the means.

It is respectfuly submitted that the narrow and restrictive decision herein by the State Appellate Courts below is completely against the grain of all the above-cited and quoted decisions involving the Safety Appliance Acts and their remedial purposes.

As such, this State decision and the resultant effect upon Petitioners violates their further rights to due process of law

afforded them by the 14th Amendment to the United States Constitution.

> "* * * *nor shall any State deprive any person* of life, liberty, *or property*, without due process of law; * * *" U. S. Const., Am. XIV, § 1. (Emphasis Added).
>
> "* * * if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment. * * *" *Williams v. Tooke*, 108 F. 2d 758 (5th Cir., 1940), *cert. denied* 311 U.S. 655, at p. 759.
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> "Nothing that the State can do will be allowed to destroy the federal right which is to be vindicated * * *". *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939) at p. 350.
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> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has been long established by decisions of this Court. * * *" *Shelley v. Kraemer*, 334 U.S. 1 (1948) at p. 14.
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> "* * * It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of State power which we are asked to scrutinize." *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) at p. 463.
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> "* * * a State may not, by *any* of its agencies, disregard the prohibitions of the 14th Amendment. *Its judicial authorities may keep within the letter of the statute * * * and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. * * **" *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), at pp. 234, 235 (Emphasis Added).

Petitioners submit they had a *property interest* in their federally-created rights under the Safety Appliance Acts and their respective causes of action arising therefrom, as heretofore liberally applied by the Courts, as well as the Trial Court's judgment for them under said Acts. They have been deprived of that property interest by the decision of the State Appellate Courts.

> "* * * *Whether acting through its judiciary* or through its legislature, *a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy*, unless there is, or was, afforded to him some real opportunity to protect it. * * *" *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U.S. 673 (1930) at p. 682. (Emphasis Added).
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> "* * * *a vested right of action is property* in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or the principles of the common law it is not competent for the (State) to take it away. * * *" *Pritchard v. Norton*, 106 U.S. 124 (1882) at p. 132. (Emphasis Added).
>
> "* * * (only) so long as a substantial and efficient remedy remains or is provided due process of law is not denied * * *" *Crane v. Hahlo*, 258 U.S. 142 (1922) at p. 147.

The necessary result of the State Appellate Courts' erroneous decisions in this case has been to deny Petitioners *all* recourse to their right of action derived from the federal Safety Appliance Acts.

This right of action and the Trial Court judgment rendered pursuant thereto, has not merely been changed or altered or affected in some procedural detail — *it has been taken away.*

Petitioners submit this action by the State Appellate Courts by its very nature is arbitrary and capricious, and denies them their 14th Amendment guaranty of due process.

IT CONSTITUTES MANIFEST CONFLICT WITH THE DECISIONS CITED AND QUOTED HEREIN AND SET FORTH IN APPENDIX B — SPANNING 67 YEARS.

The arbitrariness and capriciousness involved here is shown by the conflict between the decision in this case and the treatment and decisions in the cases cited and quoted herein and set out in Appendix B, below. It is *underscored* by the conflict between this case and two other cases from the *same* intermediate State Appellate Court.

In *Thomas v. Kansas City Southern Ry. Co.*, cited above, 305 S.W. 2d 642, it was undisputed that the railroad car involved in that case "* * * was equipped with *all* standardized safety appliances prescribed by the Interstate Commerce Commission for cars of its class, *and they were all secure.*"[23]

Yet, the Beaumont Court of Civil Appeals held that a board laying along the top of the side wall of a gondola car, at the head of a side ladder, fastened in place by bolts, was, as a matter of law, a "handhold" within § 4 of the Safety Appliance Acts. The Court's recognition that it was expanding and liberalizing the coverage of the Acts' absolute duties is clearly shown by its statement of its holding:

> "After much deliberation, and *with no sure nor even satisfactory guide,* * * * we have concluded that within *contemplation* of the Safety Appliance Acts the board that gave way with appellant was, *as a matter of law,* a handhold which appellee was required to have secure."[24]

[23] 305 S.W. 2d at p. 644. (Emphasis Added).
[24] 305 S.W. 2d at p. 645. (Emphasis Added).

Of course, *not one* of the Safety Appliance Acts specifically names or designates any "boards along a top side wall of a gondola car" as a "safety appliance". *Not one* of the Acts specifically says that "substitute grab irons or handholds" are the same as "grab irons and handholds" and are "safety appliances."

In *Southland Paper Mills, Inc. v. Rhoads, cited above,* 434 S.W. 2d 730, the *gasket inside the dome lid* was determined by the Court to be a "safety appliance."[25]

The necessity for such a gasket, and the "safety appliance" character thereof is shown in this statement of the Court:

> "* * * Without a gasket there was nothing to prevent the leaking of soap out of the tank car when it was stopped or received the slamming, backing, and shoving movements the tank car would undergo in the switching process. * * *"[26]

Consequently, the gasket in *Rhoads* was determined by the Court to be:

> "* * * a *safety appliance* to prevent the leaking of the liquid in a tank car where the liquid is sloshed by starting and stopping."[27]

Again, *not one* of the Safety Appliance Acts specifically names or designates "gaskets" as "safety appliances." *Not one* of the Acts specifically names or designates *any* "safety

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[25] 434 S.W. 2d at p. 732.

[26] *Ibid.*

[27] *Ibid.*, (Emphasis Added).

appliance" which must be secure, efficient, or operate properly "to prevent the leaking of liquid in a tank's car", or for which the gasket in *Rhoads* could have been a "substitute".

Obviously, what is involved here goes directly to the substance of Petitioners' property represented by their right of action pursuant to the Acts *and* the judgment entered in their favor by the Trial Court based on violation of the Acts' absolute duties.

The mechanics, or implementation of the assertion of the non-employee's case arising from federally-created rights under the Safety Appliance Acts lie with the State Courts.[28]

The primary thrust of this approach is to preserve, *where applicable* under State law, certain defenses to non-employee cases. See, *e.g.*, *Crane*, cited above; *Meredith*, cited above.

Defenses *not* involved in this case.[29]

However, the mechanics involved *do not and should not alter the substance and purpose of the federal Safety Appliance Acts' absolute protections.*

> "* * * The federal Safety Appliance Act, as we have already said and as this court repeatedly has ruled, *imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview;* * * *" *Fairport, P. & E. R. Co. v. Meredith*, cited above, 292 U.S. at p. 598. (Emphasis Added).

[28] *Crane v. Cedar Rapids & I.C.R. Co.*, 395 U.S. 164 (1969) at p. 166; *Meredith*, cited above, 292 U.S. at p. 598.

[29] *Hercules, Inc. v. Eilers*, cited above, 458 S.W. 2d at p. 224; (Tr. 570-593).

> "* * * a failure of equipment to perform as required by the Safety Appliance Act *is in itself an actionable wrong*, * * *" *O'Donnell v. Elgin, J. & E. R. Co.*, cited above, 338 U.S. at p. 390. (Emphasis Added).
>
> "*Once the violation is established*, only causal relation is in issue. * * *" *Carter v. Atlanta & St. A. B. R. Co.*, cited above, 338 U.S. at p. 434. (Emphasis Added).

See also: *Affolder v. New York, C. & St. L. R. Co.*, cited above, 339 U.S. at p. 99; *Moore v. Chesapeake & Ohio Ry. Co.*, cited above, 291 U.S. at p. 213.

So, we are dealing with a right to implement a cause of action *which arises from a series of federal legislation — the Safety Appliance Acts.* That right, when asserted by a non-railroad employee, must be *implemented* in State Court, absent diversity.

But, the right must be preserved and protected in terms of the federal statutes giving rise to it and bearing in mind the federal decisions construing and applying the absolute statutory protection and liabilities.

> "In construing the Federal Safety Appliance Act, as with other Federal Statutes, we must look to the Federal decisions for its interpretation. * * *" *Boyer v. Atchison, T. & S. F. R. Co.*, 230 N.E. 2d 173 (Ill., 1967), *cert. denied* 390 U.S. 949, at p. 176.

Consequently, local practice and procedure, such as the "special issue" practice in Texas and utilized in this case must give way to federal standards.

In *Arnold v. Panhandle & S. F. R. Co.*, 353 U.S. 360 (1957), reversing 283 S.W. 2d 303, the State Court of Civil Appeals had erroneously ruled that a general verdict for the employee was controlled by inconsistent findings on special

issues. The Texas Supreme Court had found no reversible error and likewise reversed.

This Court ejected both the State Courts, holding that the evidence supported the judgment and the railroad had played a part in producing injuries. Further, that the jury's finding on the special issues were not in square conflict with the general finding in favor of Arnold, but that in any case, the local Texas "special issue" procedural practice rules *could not defeat rights under the federal statutes.*

Citing *Rogers v. Missouri Pac. R. Co.*, 353 U.S. 500 (1957); *Webb v. Illinois C. R. Co.*, 352 U.S. 512 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957); *Shaw v. Atlantic Coast Line R. Co.*, 353 U.S. 920 (1957); *Futrelle v. Atlantic Coast Line R. Co.*, 353 U.S. 920 (1957); *Deen v. Gulf, C. & S. F. R. Co.*, 353 U.S. 925 (1957) (Texas case); *Thomson v. Texas & Pacific Ry. Co.*, 353 U.S. 926 (1957) (Texas case), it was held that the passageway *as used* was *not* a safe place for Arnold to work in while performing his assigned duties.

This Court stated:

> "* * * *The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based.* Hence all of the findings in the case might well be true insofar as the record indicates. *The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '* * * the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice.' * * *"*[30]

[30] 353 U.S. at p. 361. (Emphasis Added).

The decisional trend of this Court, exemplified by the Safety Appliance Acts cases cited and quoted above, has clearly rejected qualification of the concept of absolute duty and has consistently liberalized the application of the Safety Appliance Acts both as to appliances within the Acts and classes of persons absolutely protected by the Acts.[31]

The dome lid of a railroad tank car is not specified in any of the Safety Appliance Acts and is not among the regulations of the I.C.C., as of the time of the occurrence in question.[32]

However, Petitioners submit that the dome lid in question constituted, in fact and in law, a "safety appliance" within the spirit and meaning of the federal Safety Appliance Acts as applied and that the absolute duties and liabilities of the Acts apply to the occurrence in question.

The dome lid on tank car No. UTLX 48028 is the *only* pressure venting appliance to release internal pressure in the car until the car's safety valves are activated at 25 pounds per square inch ("psi") (Pl. Ex. 5; SF 28, 29, 45, 56, 57).

Before 25 psi developed inside this tank *over 5,000 pounds of force* would be being exerted on the internal face of the dome lid, enough to blow the lid off long before the safety valves would automatically activate (SF 177, 178).

The dome lid of tank car No. UTLX 48028 was a safety appliance on which Earl Eilers and Glenn Patrick and their

[31] See, *e.g.*, *Shields*, cited above, 350 U.S. 318; *Meredith*, cited above, 292 U.S. 589. See also: McCoid, *The Federal Railroad Safety Acts and the Federal Employers' Liability Act: A Comparison*, 17 Ohio State L. J. 494 (1956).

[32] 49 C.F.R., Part 231, *Transportation*.

fellow workers relied to vent and prevent the build up of pressure within the car (SF 106, 107, 129, 135, 499, 511).

> "* * * those who work on train cars may necessarily have to rely on the security * * *" (of this safety appliance). *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. at p. 323.

If the pressure could not vent normally under or around the dome lid, the tank car was abnormal (SF 131, 132, 135, 247, 511).

> (This safety appliance) "* * * was required for the proper use of the car." *Shields*, cited above, 350 U.S. at p. 323.

The fact that this dome lid stuck air-tight enabled the internal pressure of tank car No. UTLX 48028 to build up to the point where it blew the lid off, severely injuring Earl Eilers and killing Glenn Patrick (SF 119, 131, 132 135).

> (This safety appliance was used) "* * * not simply because it happened to be there, but also because it had to be there for (them) to perform (their) duties safely. * * *" *Shields, cited above*, 350 U.S. at p. 324.

The duties that Earl Eilers and Glenn Patrick were performing at the time of the explosion were essential to the operation and use of the tank car (SF 470, 474, 488, 497, 499). *Shields*, cited above 350 U.S. at p. 324.

That the dome lid on tank car No. UTLX 48028 was in fact and in law a safety appliance, necessarily required by the purpose and spirit of the Safety Appliance Acts and requiring absolute duties to assure its safe operation, is clearly evidenced through this record.

In this case, the Trial Court performed the traditional Court function of interpreting the meaning of the term "safety appliance" (Tr. 552, 553). Given the Court's definition and interpretation of that term, the jury then performed the fact-finding determination that factual elements existed so that the Safety Appliance Acts did in fact apply to the dome lid of tank car No. UTLX 48028 (Tr. 553).

As the result of its function of interpreting the Safety Appliance Acts, the Trial Court instructed the jury in this case that a "safety appliance" meant:

> "* * * an appliance necessary and furnished for the safe use of a railroad tank car and the proper and efficient operation of which is required for the absolute safety of those whose work takes them on or near a railroad tank car." (Tr. 552, 553).

And, in Special Issue No. 7, the jury was asked if, from a preponderance of the evidence, the dome lid of tank car No. UTLX 48028 was a "safety appliance". The jury answered "Yes". (SF 553).

The Trial Court's definition of "safety appliance" correctly embodied the precise elements stated by this Court in its opinion in *Shields*, cited above, 350 U.S. at p. 323 ("* * * appliances necessary and furnished for the safe use of the car, * * *"); again, at p. 323 ("* * * an absolute and imperative duty, * * *"); at p. 324 ("* * * it had to be there for him to perform his duties safely, and performance of his duties was essential to the operation of the tank car. * * * *"; again, at p. 324 ("* * * * appliances designed to insure safety * * * *"); and, at p. 325 ("* * * * As to him, the

violation of the statute must therefore result in absolute liability. * * * "). These same elements pervade the Courts' consideration of almost every Safety Appliance Acts case because they concisely express the over-all purpose of this series of legislation and the judicial liberalization and extension thereof.[33]

No "interpretation" was performed by the jury in this case. Instead, the jury performed its traditional role of determing whether the facts of this case fit a legal definition — just as when a jury determination is made regarding a "proximate cause." The mere fact that this case deals with absolute liability arising from absolute duties imposed by the United States Congress and continually liberalized by Courts does not alter the respective functions of Court and jury.

> "* * * whether the court or jury is to apply the statute depends upon the usual rules for submission of cases on the evidence — whether reasonable men might differ on the evidence. If they would differ, then the application is for the jury. * * *"[34]

> "* * * Whenever the facts are in dispute the application of the Statute to the facts as found from the evidence is clearly for the jury. * * *"[35]

The primary authority cited and quoted in that portion of the opinion of the intermediate State Court dealing with the issues of "safety appliance" as a question of "law" or

[33] See, *e.g.: Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, cited above, 338 U.S. 384; *Affolder v. New York, C. & St. L. R. Co.*, cited above, 339 U.S. 96.

[34] Crawford, *The Construction of Statutes*, Sec. 182 at p. 306 (1940).

[35] deSloovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 Harv. L. Rev. 1086 (1933) at p. 1095.

"fact",[36] is the 5th Court of Appeals' opinion in *Atlantic Coast Line R. Co. v. Shields*, 220 F. 2d 242 (5th Cir., 1955) which was reversed by this Court in the *Shields* opinion which has been cited and quoted above, 350 U.S. 318.

The questionable character of the 5th Circuit's opinion in *Shields* as "authority" has a further shadow cast on it by this Court's favorable reference in *Shields*,[37] to *Southern Pacific Co. v. Carson*, 169 F. 2d 734 (9th Cir., 1948) which involved the question of whether a *piece of hickory wood* (a brake club) in general use as a lever on tank car hand brakes was *part* of the hand brake, bringing into play the Safety Appliance Acts. The "brake club" in question had broken, injuring the workman. The Trial Court charged the jury, in part, as follows:

> "If you find from a preponderance of the evidence that the hand brake in question would not operate on the tank car in question without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you."[38]

There followed instructions requiring the jury to disregard any contributory negligence where there was a "violation of the Safety Appliance Act."[39]

[36] *Hercules, Inc. v. Eilers*, cited above, 458 S.W. 2d at p. 228.
[37] 350 U.S. at p. 323.
[38] 169 F. 2d at p. 736.
[39] *Ibid.*

In the *Carson* case, as in the initial appeal in this case, the *contention* of the Defendant-Appellant was that:

> "* * * *as a matter of law* the brake club *was not* a part of the hand brake *within the intendment of the Safety Appliance Act* and the order of the Interstate Commerce Commission, *hence the court committed reversible error in allowing the jury to determine the question as one of fact.* * * *"[40]

This contention was soundly rebuked by the Court which concluded that in its judicial evaluation of the facts and circumstances of the case, the brake club was, as a matter of law, an "essential part" of the hand brake, and the Acts applied rendering the Defendant-Appellants absolutely liable for the workman's injuries. Insofar as the submission and charge to the jury, the Court stated:

> "* * * Appellant suffered no prejudice because of the submission of the question to the jury."[41]

Petitioners submit that is the case here as well.

Here, the Trial Court correctly determined in its judgment that the dome lid, found by the jury to be a "safety appliance", *was a safety appliance with the Safety Appliance Acts as a matter of law* (Tr. 636). And, that:

> "* * * the jury's verdict establishes liability against the defendants, Union Tank Car Company, Hercules, Inc., Atchison, Topeka & Santa Fe Railway Company, as sued for by the plaintiffs as provided in 45 United States Code Section 1, et seq." (Tr. 636).

In other words, that *as a matter of law* the dome lid was a safety appliance for which Respondents incurred absolute

[40] *Ibid.* (Emphasis Added).
[41] 169 F. 2d at p. 738.

liability, jointly and severally, based on the Acts' absolute duties, since this safety appliance had failed to operate properly and had proximately caused the occurrence in question, as found by the jury (Tr. 553).

Petitioners submit that the action of the intermediate State Court in reversing the Trial Court's judgment amounted to error — both as a wrongful usurpation of the jury's function and as a clearly erroneous reweighing of the facts to arrive at a wrong legal conclusion on "a matter of law" — and that the dome lid in question *was* a safety appliance within the Safety Appliance Acts *in fact and in law.*

Clearly, Glenn Patrick and Earl Eilers were in a class of persons protected by the Safety Appliance Acts.[42]

No act or omission of either Glenn Patrick or Earl Eilers was found by the jury to have been negligence proximately causing the occurrence in question (Tr. 479-586).[43]

Further, the jury *refused* to find that any conduct on the part of "EasTex, Inc., its supervisors, foreman or employees, * * * either individually or in combination, was the sole cause of the accident in question." (Tr. 592).

And the jury found that the occurrence in which Glenn Patrick was killed and Eilers injured was *not* an "unavoidable accident" (Tr. 593).

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[42] *Shields v. Atlantic Coast Line R. Co.*, cited above, 350 U.S. at p. 325; *Barney v. Staten Island R. T. Ry. Co.*, 316 F. 2d 38 (3rd Cir., 1963), *cert. denied* 375 U.S. 826, at p. 40.

[43] *Cf. Crane v. Cedar Rapids & I. C. Ry. Co.*, cited above, 395 U.S. 164.

Instead, the jury found that the occurrence *was* proximately caused by the failure of the tank car's dome lid to operate properly to release the car's internal pressure (Tr. 553).

Therefore, the factors in the *Crane* case, cited above, with reference to the presence of contributory negligence and the absence of proximate cause findings, are *not* involved in this case.

The plain effect of the decision of the intermediate State Court in this case is to erroneously impose, with unduly harsh results, the constructional rule of *expressio unis est exclusio alterius*. Petitioners submit that rule has no place here and does not serve as a proper guide to legislative intent in this instance.

The "*expressio unis*" rule was urged unsuccessfully by the Defendant-Respondent in *Johnson v. Southern Pacific Co.*, cited above, 196 U.S. 1, and solidly rejected by this Court:

> "* * * it is said * * * that the rule that the expression of one thing excludes another applies. *That, however, is a question of intention*, and there was *special reason* for requiring locomotives to be equipped with power driving-wheel brakes, *if it is also necessary that locomotives should be equipped with automatic couplers, and the word 'car' would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed.* * * *"[44]

[44] 196 U.S. at p. 15. (Emphasis Added).

This Court continued that insofar as achieving the object of the Acts:

> "* * * it was as necessary for the safety of employees in coupling and uncoupling that locomotives be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, * * *"[45]

It was as necessary to the safety of Glenn Patrick and Earl Eilers that tank car No. UTLX 48028 have a properly operating, pressure venting dome lid, as it was for the tank car to have grab irons, running boards, automatic couplers, or any of the other specifically named safety appliances — clearly more so.

And it was certainly as important to the object of the Acts — "*Protection of Employes and Travelers*".

Petitioners submit that this case is within, and calls for, the absolute duties and liabilities of the Safety Appliance Acts. That this case, crystallizing the abject need of workers on railroad cars to have absolute protection from insidious dangers, requires a continuation of the heretofore consistent, liberal application of the Acts.

The decisions of the State Appellate Courts erroneously depart from this consistency and directly conflict with the precepts and results of this Court's decisions in *Shields*, *Coray*, *Affolder*, *Johnson*, *O'Donnell*, *Brady*, *Meredith*, *Rigsby*, *Taylor*, cited and quoted above. See also: Appendix B.

[45] *Ibid.*

Therefore, Petitioners pray that this Court will grant their Petition for Writ of Certiorari and that the decisions of the State Appellate Courts will be reversed.

Respectfully submitted,

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Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar and one of the counsel of record for the Petitioners herein and that, on the ..... day of ....., 1971, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rule 33, Para. 1, by depositing same in the United States post office, Jasper, Texas, with first class postage prepaid, and properly addressed to their respective counsel of record at the post office address of each, to wit:

Respondent, Hercules, Inc., to its counsel of record: Mr. Richard B. Miller, Baker, Botts, Shepherd & Coates, 1 Shell Plaza, Houston, Texas 77001.

Respondent, Union Tank Car Company, to its counsel of record: Mr. George A. Weller, Weller, Wheelus, Green & Brocato, Beaumont Savings Building, Beaumont, Texas 77701.

Respondent, Atchison, Topeka & Santa Fe Railroad Company, to its counsel of record: Mr. Chilton O'Brien, O'Brien & Richards, Petroleum Building, Beaumont, Texas 77701.

Tonahill Building
Jasper, Texas 75951